Supreme Court, U. S.
FILED
NOV 21 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1978

No. 78-194

CHAMPION OIL COMPANY, INC.,
An Alaska Corporation,
Petitioner,

CHARLES F. HERBERT, Commissioner,
and THOMAS E. KELLY, Former
Commissioner of Department of
Natural Resources; F. J. KEENAN,
Director of Division of Lands;
THE STATE OF ALASKA;
and F. T. WETZEL,
Respondents.

Petitioner's Reply Memorandum on Petition for a Writ of Certiorari to the State of Alaska

PETITIONER'S REPLY BRIEF

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Petitioner's Reply Memorandum

PETITIONER'S REPLY BRIEF

In their Response Brief in No. 78-194, respondents have concluded that petitioner was not entitled to minimal due process protections regarding its participation in Alaska's 23rd Competitive Oil and Gas Lease Sale (hereafter referred to as Sale). Relying on *Bishop v. Wood*, 426 U.S. 341 (1976), respondents seem to have reached this conclusion by the following reasoning: first, the Court held that a property interest (or legitimate claim of entitlement) can be created by ordinance (pre-

sumably, any valid legislative enactment); second, the existence of an interest and the dimensions of due process to be accorded such interest must be ascertained by reference to state law; third, if the state does not guarantee an interest or benefit to a party, then the latter has no protected interest;[1] and, fourth, even if a party does have an interest, he need be accorded only such protection as the state may have provided within its enactment(s). Next asserting that petitioner has predicated its claim solely on its *participation* in the Sale (Response Brief, pp. 9,12), respondents point out that no enactments or notices guaranteed issuance of leases to petitioner, nor was there any violation by the State of such procedures or protections as may have existed. Finally, respondents assert that even if pertinent statutes, regulations and notices were unclear, administrative regulations, (11 A.A.C. 505.43, 11 A.A.C. 505.51) gave the agency authority to reject all bids.[2] (See Response Brief, pp. 10-11). Undeniably, respondents' conclusions are permissible (although, petitioner contends, nonetheless constitutionally infirm and improper) under *Bishop*.

However, respondents' argument proceeds from a misstatement of petitioner's argument; that is, petitioner does not

1. A fair reading of *Bishop* does not support the conclusion that such a "guarantee" is a constitutional prerequisite to 14th Amendment protection of an interest. Rather, it would appear that the Supreme Court of North Carolina had so held, and the Court therefore found such to be prerequisite in *that* case.

2. Although a complete affront to concepts of due process, Respondents' ultimate conclusion is that the State was even free to carry out the lease sale pursuant to *unclear* statutes, regulations, and notices, since authority existed within its own regulations (11 A.A.C. 505.43) to reject all bids. (Response Brief, pp. 10-11). Regarding the need for maintaining, upgrading and clarifying standards and principles which guide agency action, see the comments of Bazelon, Chief Judge, in *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971); see also 1 K. Davis, ADMINISTRATIVE LAW TREATISE §§6.13-6.16, 6.20 (1970 Supp.). It may be noted that an open-ended power residing in an agency by which it may avoid its own rules, or deny applications for benefits in the absence of standards, opens the door to unreasonable discrimination and invites political graft and corruption.

contend that it possessed a constitutionally protected interest merely or solely by way of *participation* in the Sale. Rather, petitioner's interest exists as a result of enabling statutes[3] which permit the Sale and regulations[4] which guide, control, and condition the acts of agency personnel as they carry out the Sale, as well as set forth the requirements which must be met in order to meaningfully compete for proffered government benefits.

The statutes, regulations, and notices thereof which attended the Sale gave rise to petitioner's reasonable reliance and legitimate expectations and, coupled with participation, gave petitioner a property interest entitled to protection under the Fourteenth Amendment.[5] *Perry v. Sindermann*, 408 U.S. 593, 600-601 (1972); *Board of Regents v. Roth*, 408 U.S. 564, at 571-572 (1971); *Memphis Light, Gas and Water Division v. Craft*, 46 U.S.L.W. 4398 (1978).[6]

Respondents have argued that petitioner's participation in the Sale did not "vest" in it any property interest (Response Brief, pp. 8, 9, 13, 14) entitled to due process protections. Whether respondent is speaking in terms of fee simple absolute, or otherwise, it is apparent that "the Fourteenth Amendment's protection of 'property' . . . has never

3. Alaska Stat. §38.05.18, *et seq.*

4. 11 A.A.C. 505; 11 A.A.C. 84.

5. Petitioner respectfully proposes the following test for the identification of property interests or "legitimate claims of entitlement" meriting protections of the Due Process Clause: (1) is there a statutorily-created benefit; (2) have rules been promulgated setting forth procedures for acquiring this benefit; (3) have conditions regarding eligibility been promulgated and published; (4) has the aggrieved party availed or attempted to avail himself/herself of such benefits? Affirmative answers to these questions would seem to indicate the presence of a reasonable and legitimate expectation meriting due process protections. A similar test would be appropriate regarding mutual understandings and practices existing between the state and private party. *See*, e.g., *Perry v. Sindermann*, 408 U.S. 593, at 600-601 (1972).

6. Compare *Goldsmith v. Bd. of Tax Appeals*, 270 U.S. 117 (1925).

been interpreted to safeguard only the rights of undisputed ownership." *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972); *accord*, *Craft*, *supra*, at 4401.[7]

The conflict existing between the holdings in *Bishop* and *Craft* poses a serious and substantial question of constitutional law which directly bears upon whether or not the several states will be allowed to control and curtail the reach of the Fourteenth Amendment. Pared to its essence, respondent's argument, relying as it does upon *Bishop*, is a bold assertion that due process protections regarding "property" interests shall enjoy such stature as a state may wish to grant. (See f.n. 2, *supra*, and Response Brief, pp. 10-11).

Despite respondents' avoidance of the issue, it seems indisputably clear that *Bishop* and *Craft* should be reviewed and their conflict resolved. Therefore, petitioner respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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7. It seems clear that the holding in *Bishop* would indeed permit a state to engage in a right-versus-privilege analysis of property interests and thereby control the definition of such interests for purposes of due process protection, while such would not be possible under *Craft* because "federal constitutional law determines whether that interest to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." Id., at 4400; *accord*, *Board of Regents v. Roth*, 408 U.S. 564 at 577 (1972), and *Perry v. Sindermann*, 408 U.S. 593 at 602 (1972).